

1 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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3 Public Hearing on)
 4 Proposed Revisions to)
 5 30 TAC Chapter 101 and)
 6 to the State)
 7 Implementation Plan)

8

9 Houston-Galveston Area Council
 10 3555 Timmons Lane
 11 Room A
 12 Houston, Texas 77027

13 Wednesday
 14 January 9, 2013

15 The above-entitled matter came on for hearing, pursuant
 16 to notice, at 2:00 p.m.

17

18 FACILITATOR: Kathy Pendleton,
 19 Air Quality Division

20

21 PRESENTERS: Mr. Brandt Mannchen

22

Mr. Jed Anderson

23

Mr. Adrian Shelley

24

25 ALSO PRESENT:

26 David Brymer, Air Quality Division
 27 Jamie Zech, Air Quality Division
 28 Matoaka Johnson, Air Quality Division
 29 Nicholas, Williams, meeting attendee
 30 Tiffany Pino Cruse, Certified Shorthand Reporter
 31 Several other observers attended without providing their
 32 names.

I N D E X

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1 P R O C E E D I N G S

2 MS. PENDLETON: We're going to go ahead
3 and give it a few more minutes before we start, because
4 of the weather and the fact people are still making it
5 in.

6 Thanks.

7 (Break taken.)

8 MS. PENDLETON: Good afternoon.

9 MR. MANNCHEN: Hi.

10 MS. PENDLETON: I would like to welcome
11 everyone to this public hearing being conducted by the
12 Texas Commission on Environmental Quality.

13 My name is Kathy Pendleton and I'm with
14 the Air Quality Division.

15 I would also like to introduce
16 David Brymer, Director of the Air Quality Division.
17 Jamie Zech, also the Air Quality Division. And taking
18 names in the back is Matoaka Johnson of the Air Quality
19 Division.

20 We're here this afternoon to read the --
21 receive oral and/or written comments on proposed rules
22 under 30, Texas Administrative Code, Chapter 101,
23 General Air Quality Rules. A new Subchapter B, failure
24 to attain fee, sections 101.100 through 101.102,
25 101.104, 101.106 through 101.110, 101.113, and 101.16

1 through 101.122; and corresponding revision to the state
2 implementation plan.

3 If you intend to present oral comments
4 and you haven't already signed in at our registration
5 table, please do that now. And if you're not familiar
6 with the proposed changes, copies of the Subchapter B
7 proposal from the November 30th, 2012, issue of the
8 Texas Register are available at the registration table.

9 We will continue to accept written
10 comments on this proposal until Monday, January 14th.

11 This hearing is structured strictly for
12 the receipt of oral or written comments. Open
13 discussion during the hearing is not allowed. However,
14 if anyone has additional questions or comments regarding
15 the proposal, there will be another opportunity after
16 the hearing to have your questions answered.

17 We'll now begin receiving comments in the
18 order in which you registered. Once I call your name,
19 if you'll please come up to the podium, state your name
20 and who you represent, and begin your comments.

21 Thank you.

22 Brandt Mannchen.

23 MR. MANNCHEN: My name Brandt Mannchen,
24 B-R-A-N-D-T M-A-N-N-C-H-E-N, and I'm representing the
25 Houston Sierra Club today.

1 And the first comment I'd like to make is
2 a -- we hope the staff will not be -- take anything we
3 say personally; but we're real concerned about this
4 proposal. Because that is even weaker than what was
5 developed or looked at in 2009. So from our standpoint,
6 after three years, we're going even further backwards.

7 We're concerned that this proposal
8 essentially emasculates Section 185, penalty fees.
9 Unlike what is stated under the benefits and cost, there
10 will be no compliance with federal law because this
11 proposal does not meet federal law.

12 There are no incentives for reductions of
13 ozone because those responsible for air pollution will
14 be subsidized by the public and will not have to use
15 their own resources to pay for their own air pollution.

16 The proposed action by TCEQ calls to
17 question: Which side is TCEQ on? Is TCU -- TCEQ on the
18 side of the public or the polluters?

19 The TERP funding that is proposed as an
20 alternative way of meeting Section 185 is not a reliable
21 source of funds. TCEQ does not control TERP funding,
22 the Texas legislature does.

23 And also, there's no predictability
24 because the Texas legislature will take TERP funding and
25 not spend it and use it to, quote, balance the State

1 budget. So you're relying on a source of funding, even
2 if we supported TERP being used for this, which we
3 don't, that is not reliable.

4 We also don't support using inspection
5 maintenance funding from programs. It seems very odd to
6 us that the public is in compliance with its
7 responsibilities by getting tested and getting the
8 required certifications. And yet we want to use money
9 from that program to help industry out and that doesn't
10 seem like a fair thing to do.

11 What we're concerned about is by shifting
12 the burden of what 185 is supposed to do, which is
13 supposed to put the burden on companies, the public is
14 going to resent TCEQ doing this, which may lead -- lead
15 to a loss of public support for other clean-air
16 endeavors. So you may be actually undermining your
17 ability to clean up the air, because the public isn't
18 going to want to support you.

19 We also don't support using any sort of
20 omission reduction credits or supplemental environmental
21 projects as a alternative to actually charging the
22 Section 185 penalty fees that are required under the
23 law.

24 EPA has lost twice in the courts. It's
25 time for the TCEQ and the EPA to implement what the

1 Courts have said.

2 A -- the present rate for the proposal is
3 2010 -- is based on 2010, you should use the most
4 up-to-date figures you have, which would be, at least,
5 2011, if you're going to use a -- a -- a certain rate
6 under the penalty fee calculation.

7 TCEQ states that companies may curtail or
8 cease operations if these fees are apply -- applied. If
9 that is the case, then TCEQ should provide documentation
10 for how many companies it expects to curt- -- curtail or
11 cease operations.

12 In our opinion, that particular statement
13 is typical industry scare tactic that TCEQ is now using
14 to confuse and create fear in the public. We say shame
15 on you, TCEQ.

16 And finally, we say: Why are companies
17 that pollute always given a fair shake, but not the
18 people? It's the people who breath the air and get
19 sick. It's the people whose welfare is degraded. And
20 we want these penalty fees implemented so that companies
21 have an incentive to reduce their pollution more and
22 also as peer pressure against those companies that
23 aren't reducing their pollution.

24 If you a -- focus strictly on bad actors,
25 the good actors get away with not paying the fees, which

1 they're supposed to, and they don't apply the peer
2 pressure for the bad actors. So we think you're
3 undermining yourself.

4 I want to end my comments, but we do have
5 a -- a whole series of things that we think a good
6 penalty policy should include. And they're, basically,
7 a lot of the things we said three years ago, and we
8 think they still apply.

9 Thank you very much.

10 MS. PENDLETON: Thank you.

11 Jed Anderson.

12 MR. ANDERSON: My name is Jed Anderson.

13 I'm an environmental attorney and I'm a professor of law
14 at the University of Houston Law School, where I teach
15 the Cleaner Act Class. I'm not here in any official
16 capacity or representing anyone, but I'm here a -- just
17 as a citizen of the Houston community.

18 This specific concern I wanted to share
19 today relates to the underlying federal law that TCEQ is
20 proposing to implement. I believe that Section 185 fees
21 are unjust. Regardless of whether these fees are
22 imposed on local businesses or local citizens via TERP
23 IM substitute.

24 As Texans, we must continue to improve
25 and clean our environment, but we cannot use unjust

1 means to do so. We simply cannot punish our own
2 citizens and businesses for part of the non-payment
3 problem they did not cause and cannot control.

4 I would, therefore, recommend that the
5 State of Texas challenge the Section 185 fee law and
6 work to amend the law in Congress to ensure justice and
7 fairness to our citizens and businesses.

8 I will explain why I believe this law is
9 unjust; but I first wanted to briefly point out that
10 Congress can make mistakes. I know this comes as no
11 surprise, but Congress can make mistakes. Our nation's
12 history has several examples where mistakes are made or
13 where circumstances have changed to make, what at the
14 time was, a just law into an unjust law. Such laws can
15 be corrected. It's not a big deal to acknowledge and
16 fix mistakes. It is a big deal, however, to perpetuate
17 them.

18 The beauty of our system is that it is
19 designed to correct mistakes. Justice and fairness may
20 stay hidden for a while in our system, but eventually
21 they always carry the day. Always.

22 The Section 185 penalty is unjust. The
23 Section 185 penalty is imposed for failing to achieve
24 attainment. The question is: Who should be responsible
25 for that failure? Who should be penalized?

1 The fact is that about 50 to 75 percent
2 of the ozone in Houston is now background pollution,
3 international pollution, or interstate pollution that
4 the Houston community cannot control or that Congress
5 has not given the Houston community the legal authority
6 to control.

7 Of the remaining 25 to 50 percent of
8 potentially locally-generated ozone, approximately 50 to
9 65 percent of this ozone is now generated from federally
10 preempted mobile sources that the Houston generally is
11 prohibited from controlling. As, you know, we cannot
12 generally a -- adopt engine standards.

13 That leaves the Houston community with
14 the ability to potentially control approximately 9 to 25
15 percent of the problem. Yet the Houston community is
16 held 100 percent responsible. They must pay 100 percent
17 of the penalty for failure to attain. This is simply
18 unfair and unjust.

19 One way to make this rule fair and just
20 is to remove the law.

21 Another way is to give the Houston area
22 the constitutional and a legal authority to regulate
23 omissions in other states in other count- -- countries,
24 other parts of the state and from internationally and
25 federally preempted mobil sources so responsibility

1 would be in line with authority.

2 The final way would be for Congress to
3 assess a fee against the federal government for a
4 portion of the Houston area omissions the federal
5 government failed to timely control, to meet the Houston
6 attainment deadline set by the federal government.

7 The Houston community should not be
8 penalized and its citizens and businesses assessed a
9 fine for the part of the ozone problem the Congress and
10 the federal government failed to control in a timeframe
11 consistent with that which Congress and the federal
12 government set for achieving the standard. It is
13 unjust, plain and simple.

14 The highest respect for the law is to
15 ensure that a law is just. The State of the Texas
16 should constitutionally and legally challenge this law
17 to demonstrate such respect.

18 The State of Texas should also work
19 politically to help effectuate changes to these laws.
20 We just must continue to improve and clean our
21 environment, but we cannot use unjust means to do so.
22 We simply cannot punish Houston citizens and businesses
23 for a problem they did not cause.

24 Thank you for your consideration.

25 MS. PENDLETON: Uh-huh. Thank you.

1 Adrian Shelley.

2 MR. SHELLEY: My name is Adrian Shelley.

3 I am here today representing Airlines Houston.

4 And a -- we just want to point out, first

5 of all, that this is an opportunity. The determination

6 of failure to attain one hour ozone was an opportunity.

7 It's not an opportunity to continue to reduce ozone

8 pollution in the Houston area.

9 Now we're very close to attaining

10 one-hour standards, but we're not there yet. What we've

11 been given here is another tool that we can use right

12 now to continue to reduce ozone pollution to attain that

13 standard. We don't have to wait around for the revised

14 eight-hour standard. We have this tool available right

15 now.

16 It's our hope that this program is seen

17 as an opportunity a -- and that a program is produced

18 that takes full advantage of what we see as an

19 opportunity.

20 That being said, we feel that the rule

21 that has been proposed does not treat this as the

22 opportunity that it is. We believe that it has been

23 approached as an obligation -- an obligation on

24 polluters that is to be avoided at all cost.

25 We think there are a number of things

1 that have been done in this rule, and there are some
2 things that it is explicitly stated, have been done in
3 order to avoid obligations.

4 I'm just going to mention here three
5 issues that we have. There are some others that will be
6 in our written comments that will be submitted later.

7 So, first, the fee equivalency account.
8 We think this is just the clearest example possible that
9 TCEQ has misunderstood the purpose of this statute. We
10 feel that the fee equivalency account amounts to a shell
11 game. It's taking money that, as Brandt pointed out, is
12 already being collected and is being collected from the
13 drivers in the Houston areas and is already being used
14 by the Texas legislature to achieve emissions
15 reductions.

16 Those programs, TERP and the Vehicle
17 Inspection Maintenance programs existed long before this
18 obligation. They were in place and they were
19 operational before the obligation and we see no reason
20 to drag existing successful programs into this issue.

21 We also want to point out that there is,
22 you know, actually been created kind of a perverse
23 incentive here -- another incentive not to use this
24 money. Once again, as Brandt pointed out, the Texas
25 Legislature already takes some of this money and uses it

1 to balance the budget. Our concern is that we now have
2 another incentive now not to use the money. The money
3 that is collected in the Houston area will be placed --
4 or credits representing that money will be placed in the
5 fee equivalency account. Those credits can be held over
6 from one year to the next.

7 Our concern is that once that account is
8 filled with enough credits to permanently eliminate the
9 obligation, that money will just sit there. We are --
10 fear that this is actually worse than nothing. The TERP
11 and IM programs already exist, they're already
12 effective, let's leave them alone. Let's use the
13 Section 185 Rule like the opportunity that it is.

14 Okay. Second, there is the issue of the
15 fee calculation obligation itself. We're concerned that
16 aggregation across major stationary sources and that
17 aggregation of the two precursors, NOX and VOCs, will
18 lead to accounting tricks, more shell games, and more
19 confusion.

20 It was pretty clear, in the limited
21 approval and disapproval of EPA -- by EPA of the San
22 Joaquin Valley rule, that the obligation exists
23 independently for VOCs and for NOX. The EPA discussed
24 that calculation. They approved of it solely because it
25 kept those calculations separate.

1 The calculation that has been proposed
2 here does not keep those obligations separate. It
3 combines -- it allows the combining of the pollutants.
4 Once again, we're concerned that this is going to lead
5 to confusion and that it is essentially an accounting
6 trick.

7 Finally, we have the timing of the rule.
8 Now, the federal statute states that the obligation
9 begins in the year after the attainment date. The
10 attainment was 2007, the obligation begins in 2008.

11 The proposed rule begins the obligation
12 in the year after the rule was promulgated. Presumably
13 that's 2013, the obligation would begin in 2012. That's
14 four years of fees that are simply going uncollected.
15 The federal statute is very clear on the year that the
16 obligation begins. And that seems to have been ignored.

17 I just want to point out, finally, that
18 even though the obligation isn't beginning until 2012,
19 under the proposed rule, the accounting trick that's
20 using to -- that's being used to credit TERP and IM
21 money begins in 2008.

22 So, in other words, you're choosing to
23 count money to offset the fee beginning in 2008, but you
24 refuse to calculate the fee obligation until 2012.

25 I know that one justification given for

1 starting the fee obligation in 2012 is the question of
2 retroactivity. I'm not going to get into that here, but
3 I just want to say that that -- that's mis- -- a
4 misplaced fear. I've discussed why in our written
5 comments, which we will be submitting later.

6 So just to reiterate and conclude, we see
7 the Section 185 program as an opportunity to achieve
8 reductions of ozone precursors in Houston now. We think
9 that the rule has been proposed misunderstands this
10 opportunity and treats it as an obligation to be
11 avoided.

12 Thank you.

13 MS. PENDLETON: Okay. Thank you.

14 Is there anyone else who would like to
15 comment?

16 (No response.)

17 MR. MANNCHE: No.

18 MS. PENDLETON: Once again, the
19 Commission will continue to accept written comments on
20 this proposal until January 14th. We do appreciate your
21 comments and we thank you for coming.

22 If there are no further comments, this
23 hearing is now closed.

24 Thank you.

25

1 STATE OF TEXAS)

2

3 REPORTER'S CERTIFICATION

4

5 I, TIFFANY PINO CRUSE, CSR, RPR, hereby
6 certify that the foregoing pages, numbered 1 through 15,
7 inclusive, are a true, accurate, and compete transcript
8 of said proceedings.

9 Subscribed to by me this day, January
10 14th, 2013.

11

12

13

14 _____
15 Tiffany Pino Cruse, CSR, RPR
16 Texas CSR 7766
17 Expiration: 12/31/2014
18 INTERGRITY LEGAL SUPPORT SOLUTIONS
19 3100 West Slaughter Lane
20 Suite A-101
21 Austin, Texas 78748
22 www.integrity-texas.com
23 512-320-8690; FIRM #528
24
25

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